

Staff Summary Report



Council Meeting Date: 06-23-04

Agenda Item Number: 4

SUBJECT: This is the introduction and first public hearing to approve Ordinance No. 2004.29 approving the City of Tempe and Valley Metro Rail, Inc. Public Way Use Agreement. The second public hearing is set for July 22, 2004.

DOCUMENT NAME: 20040623pwjism02 **TRANSPORTATION PLANNING (1101-01)** Ordinance No. 2004.29

SUPPORTING DOCS: Yes.

COMMENTS: Approval to enter into a Public Way Use Agreement with Valley Metro Rail, Inc. The Federal Transit Administration requires this cooperative agreement to approve federal funding of the light rail project. The Public Way Use Agreement authorizes Valley Metro Rail to use the right-of-way as necessary to accommodate the construction, operation and maintenance of light rail transit. Light Rail Transit is considered a long term investment; therefore, the Public Way Use Agreement term is indefinite, subject to the maximum extent permitted by law.

PREPARED BY: Jyme Sue McLaren, LRT Project Manager (350-8803)

REVIEWED BY: Glenn Kephart, Public Works Manager (350-8819)

LEGAL REVIEW BY: PENDING

FISCAL NOTE: NA

RECOMMENDATION: Staff recommends adoption of Ordinance No. 2004.29 authorizing approval of the City of Tempe and Valley Metro Rural, Inc. Public Use Agreement

ADDITIONAL INFO:

ORDINANCE NO. 2004.29

AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF TEMPE, ARIZONA, APPROVING THE PUBLIC WAY USE AGREEMENT BETWEEN THE CITY AND VALLEY METRO RAIL, INC.

WHEREAS, VMR is presently designing and constructing the Central Phoenix/East Valley Light Rail Transit Project (the "Project") which will be a new light rail system (the "System") in the Central Phoenix and East Valley area as illustrated in Exhibit A; and,

WHEREAS, Tempe is the owner or controls various property rights and interests in certain streets, public ways, and parcels needed for the System; and,

WHEREAS, VMR proposes to occupy and use a portion of such Tempe streets, public ways, and parcels on a non-exclusive basis, for the construction, operation, and maintenance of the System; and,

WHEREAS, the By-Laws of VMR defines many of the obligations of the Members of VMR; and,

WHEREAS, Tempe is a Member of VMR; and,

WHEREAS, Tempe has agreed, in that certain Design and Construction Agreement for the Central Phoenix/East Valley Light Rail Transit Project ("Design and Construction Agreement"), dated as of the date hereof, by and between Tempe and VMR to enter into this Agreement for the purpose of authorizing VMR to use certain Tempe property in connection with the System along the System Alignment described herein; and,

WHEREAS, similar but separate Public Way Use Agreements will be entered into by VMR and the Cities of Phoenix and Mesa; and,

WHEREAS, separate Operations and Maintenance Agreements will be entered into by VMR and the Cities of Tempe, Phoenix, and Mesa; and

WHEREAS, Tempe desires by this Agreement to grant such rights and privileges to VMR, and to document the terms and conditions upon which such Tempe property may be used by VMR;

NOW, THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF TEMPE ARIZONA, as follows:

Section 1. That the City of Tempe hereby approves the Public Way Use Agreement between the City and Valley Metro Rail, Inc.

Section 2. That the Mayor is authorized to execute any documents that may be necessary to carry out the purpose of this ordinance.

**PASSED AND ADOPTED BY THE CITY COUNCIL OF THE CITY OF TEMPE,
ARIZONA, this _____ day of _____, 2004.**

MAYOR

ATTEST:

City Clerk

APPROVED AS TO FORM:

City Attorney

PUBLIC WAY USE AGREEMENT

FOR THE

CENTRAL PHOENIX / EAST VALLEY

LIGHT RAIL TRANSIT SYSTEM

BY AND BETWEEN

VALLEY METRO RAIL, INC

AND THE

CITY OF TEMPE

June 2004

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EXHIBIT A - SYSTEM MAP1

EXHIBIT B - MEMBER AGREEMENT1

THIS PUBLIC WAY USE AGREEMENT (Central Phoenix/East Valley LRT Line) (the "Use Agreement"), dated as of _____, 2004, IS HEREBY ENTERED into by and between VALLEY METRO RAIL, INC., a corporation formed under the Arizona Nonprofit Corporation Act (A.R.S. § 10-3101 et seq.) by certain cities within Maricopa County utilizing the authority granted under A.R.S. § 11-952 ("VMR"), and the CITY OF TEMPE, a municipal corporation duly organized and existing under the laws of the State of Arizona ("Tempe"), individually "Party" or collectively "Parties".

R E C I T A L S :

WHEREAS, VMR is presently designing and constructing the Central Phoenix/East Valley Light Rail Transit Project (the "Project") which will be a new light rail system (the "System") in the Central Phoenix and East Valley area as illustrated in Exhibit A; and,

WHEREAS, Tempe is the owner or controls various property rights and interests in certain streets, public ways, and parcels needed for the System; and,

WHEREAS, VMR proposes to occupy and use a portion of such Tempe streets, public ways, and parcels on a non-exclusive basis, for the construction, operation, and maintenance of the System; and,

WHEREAS, the By-Laws of VMR defines many of the obligations of the Members of VMR; and,

WHEREAS, Tempe is a Member of VMR; and,

WHEREAS, Tempe has agreed, in that certain Design and Construction Agreement for the Central Phoenix/East Valley Light Rail Transit Project ("Design and Construction Agreement"), dated as of the date hereof, by and between Tempe and VMR to enter into this Agreement for the purpose of authorizing VMR to use certain Tempe property in connection with the System along the System Alignment described herein; and,

WHEREAS, similar but separate Public Way Use Agreements will be entered into by VMR and the Cities of Phoenix and Mesa; and,

WHEREAS, separate Operations and Maintenance Agreements will be entered into by VMR and the Cities of Tempe, Phoenix, and Mesa; and,

WHEREAS, Tempe desires by this Agreement to grant such rights and privileges to VMR, and to document the terms and conditions upon which such Tempe property may be used by VMR; NOW , THEREFORE,

IT IS HEREBY AGREED, by and between the Parties, as follows:

SECTION 1.0 DEFINITIONS

The following capitalized terms shall have the following meanings when used in this Agreement, unless a different meaning is clearly intended:

"Agreement" means this Agreement.

"Articles" means the Articles of Incorporation for Valley Metro Rail, Inc.

"ASU" means Arizona State University, an agency of the State of Arizona.

"Board of Directors" or "Board" means the governing body of Valley Metro Rail, Inc as described in Exhibit B.

"By-Laws" means VMR's By-Laws pursuant to the Articles.

"City" means the City of Tempe, a municipal corporation duly organized and existing under the laws of the State of Arizona.

"Contract" means any contract or contracts which VMR enters for the design and/or construction of the System including, without limitation, any change order to the design or construction contracts for the Project (as defined in the Design and Construction Agreement) which includes within its scope the design and/or construction of the System.

"Contract Documents" means the Plans and Specifications prepared for the construction of an established element of the Project prepared by VMR in conjunction with and approved by Tempe.

"Contractor" means any contractor who executes a Contract with VMR for the design and/or construction of the System.

"Design and Construction Agreement" means that certain Design and Construction Agreement for the Central Phoenix/East Valley LRT Project entered by and between Tempe and VMR, dated as of the date hereof, which document sets forth the terms and conditions pursuant to which the System will be designed and constructed.

"Effective Date" means the date on which the VMR Use Rights granted hereunder become operative, as specified in Section 3.0 hereof.

"Member Agreement" means the Articles, the By-Laws, and the Joint Powers Agreement together under and enforced by A.R.S. Section 10-3732 for Valley Metro Rail, Inc., see Exhibit B.

"Occupied Tempe Property" means all real property (including streets and improvements thereto owned or controlled by Tempe that is to be physically occupied by System improvements in accordance with this Agreement.

"Party" means VMR or the City and "Parties" means both entities collectively, as governed by the context in which such word is used.

"Plans and Specifications" means the minimum specifications required with respect to the Project which specifications are defined and/or incorporated into the Design and Construction Agreement as the Contract Documents.

"Project" means the planning, design, financing, construction, and installation of the System as set forth in the Design and Construction Agreement. At the commencement of Revenue Operations, the Project becomes the System.

"Project Submittals" means all design drawings, shop drawings, product data, test data, specifications, design and construction submittals, construction schedules, fabrication drawings, erection drawings, or similar documents that are produced by the Contractor during the design and construction of the Project, which relate to the Plans and Specifications or otherwise affect the interests of Tempe under the Design and Construction Agreement, and which are reviewed by Tempe according to the procedures and standards set forth in the Design and Construction Agreement.

"Revenue Operations" means the Project has been designed, constructed, and tested and is providing passenger service as intended, as a System.

"System" means the approximately 20-mile light rail transportation system to be owned, operated, and maintained by VMR within the System Alignment, including all tracks, stations, park and rides, light rail vehicles, conduits, electrical lines, traction power poles, traction power substations, cross-span wires, LRT traffic equipment, stray current protection equipment, and other functionally related and appurtenant equipment and facilities.

"System Alignment" means the alignment for the System agreed to by the Parties in Exhibit A of the Design and Construction Agreement.

"Use Agreement" means this Agreement.

"VMR Use Rights" means the right to use the Occupied Tempe Property, as granted to VMR in this Agreement.

SECTION 2.0 VMR USE OF TEMPE PROPERTY

2.1 Property

The specific location and course of the System Alignment has been determined in the design phase of the Project. If necessary, the Parties agree to execute, acknowledge, and record such documentation as may be necessary to evidence VMR's Use Rights. A System map is provided in Exhibit A.

VMR is hereby authorized to use, on a non-exclusive basis, the Occupied Tempe Property as shall be reasonably necessary for the construction, operation, and maintenance of the System. VMR's use of the Occupied Tempe Property shall be strictly limited to the terms, conditions, limitations, and restrictions contained in this Use Agreement. VMR may only use Tempe's public right-of-way within the System Alignment and real property designated as Park and Ride parking lots and only to the extent it is necessary for the construction, operation or maintenance of the System. Tempe retains all rights entitled to fee ownership of Tempe's real property, subsurface rights, air rights and Tempe's improvements which do not directly and materially interfere with the construction, operation or maintenance of the System.

VMR acknowledges that: (i) Tempe has previously granted licenses or permits affecting all or portions of the Occupied Tempe Property, and; (ii) no right of action in favor of VMR and against Tempe relating in any way to the existence of utility lines or facilities pursuant to such licenses or permits, or for damages of any kind against Tempe relating to such licenses, permits, lines, or facilities, or the existence of said licenses, permits, lines, or equipment, shall arise or be deemed to arise under this Use Agreement.

Tempe reserves the right to utilize the real property designated as Park and Ride facilities and transit centers, provided for the System, for development purposes that are consistent with the requirements of the Project FFGA.

Tempe reserves the right to work in, on, or around the guideway for the purpose of infrastructure improvements including, but not limited to, installing utilities under the guideway. Prior to working in, on, or around (within 10-feet) of the guideway, Tempe agrees to obtain a work permit from VMR (other than routine maintenance or repair which does not require blocking or impeding light rail operations or work which is a bona fide emergency). The purpose of this process is to identify the safety concerns

associated with working near an active trackway and to minimize the impact to light rail service. VMR will not unreasonably withhold a permit.

Tempe reserves its prior superior right to the public right of way and to other Tempe property together with all of its rights to such property under law.

2.2 Records

VMR shall keep accurate installation records of the location of all facilities in the public right of way and furnish said documents to Tempe upon request. VMR shall cooperate with Tempe to furnish such information in an electronic format compatible with the current Tempe electronic format. Upon completion of new or relocation of construction of underground facilities in the public right of way, VMR shall provide Tempe with installation records in an electronic format compatible with the current Tempe electronic format showing the location of the underground, and above ground facilities. VMR agrees to furnish the location information in a timely manner, but in no event longer than thirty (30) days.

2.3 Future Work

If, during the design process for public improvements Tempe discovers a potential conflict with the System, VMR shall either (1) locate and if necessary, expose its facilities in conflict; or, (2) use a location service under contract with Tempe to locate or expose its facilities. VMR shall reimburse Tempe for the cost resulting from number two (2), above. Tempe shall make every reasonable effort to design and construct projects pursuant to this section so as to avoid relocation expense to VMR.

SECTION 3.0 EFFECTIVE DATE; TERM

The VMR Use Rights granted herein shall not become operative until the Effective Date.

Beginning on the Effective Date, this Agreement and the VMR Use Rights herein granted shall be operative for an indefinite period of time and to the maximum extent permitted by law.

SECTION 4.0 CONSIDERATION

In consideration for the VMR Use Rights granted by Tempe to VMR hereunder, VMR agrees as follows:

VMR agrees to construct, operate, and maintain the System as set forth in the Design and Construction Agreement and the Project Submittals.

VMR agrees to provide regular System service to the general public.

SECTION 5.0 MAINTENANCE, REPAIR, RECONSTRUCTION, RELOCATING, AND/OR REMOVING

After construction of the System is completed, VMR shall comply with the following provisions concerning the ongoing maintenance and repair of improvements constructed upon the Occupied Tempe Property:

Except as otherwise provided in the Design and Construction Agreement or subsequent Agreements entered into between Tempe and VMR, the System and all Occupied Tempe Property shall be maintained by VMR with funds as provided for in the VMR Member Agreement. The System and Occupied Tempe Property shall be reasonably maintained in a manner consistent with this Agreement, with Tempe standards, and with the Project Submittals, and as governed by applicable state or federal law. The System and Occupied Tempe Property shall, at all times, be maintained in a neat, clean and orderly condition. Without limiting the foregoing, VMR shall keep the Occupied Tempe Property free of weeds, trash, garbage, and unsightly or deleterious objects or structures, and shall keep the System and all Occupied Tempe Property free from graffiti.

Prior to the performance by VMR of any maintenance or repair work on improvements constructed upon the Tempe Occupied Property (other than routine maintenance or repair which does not require blocking or impeding traffic, or work which is a bona fide emergency), VMR will obtain a permit as required by Tempe in connection with such work, and shall abide by the reasonable requirements thereof which are not in conflict with state or federal law or regulation. Tempe may require that repair and maintenance work be done during off-peak traffic times to minimize traffic disruptions. Notwithstanding the foregoing, Tempe understands and acknowledges that there may be instances when VMR is required to make repairs, in compliance with federal and/or state codes, that are of an emergency nature. If practicable, VMR will notify Tempe prior to making such repairs and will obtain the necessary permits within a reasonable time after notification.

With respect to maintenance and repair work to be performed pursuant to this Section, Tempe and VMR shall in good faith endeavor to avoid disruption of highway traffic and System service for maintenance and other work and, to the extent possible, shall agree to perform work during off-peak traffic times to minimize disruptions to System operations, business, and traffic. In cases of emergency or exigent circumstances, the Party effecting the repair shall immediately notify and cooperate in good faith with the other Party.

If any maintenance is required to be performed by VMR under this Agreement, under the Design and Construction Agreement, under any subsequently executed operations and maintenance agreement, or required by any City, State or federal legislative act, rule or regulation and is not completed within ten (10) days after written notice is sent by Tempe to VMR, or within a longer or shorter reasonable time given the nature of the maintenance required, then, and in that event, Tempe may perform such maintenance or repairs as it reasonably deems necessary, not inconsistent with

the source of the requirement or with City, State or federal law or regulation, pursuant to said notice. For such work, VMR shall entirely reimburse Tempe for all of Tempe's costs, including, but not limited to personnel and administration costs and expenses within sixty (60) days of receipt of Tempe's invoice. VMR will pay any reasonable Tempe costs or expenses incurred in collecting such maintenance costs and expenses, including attorney's fees.

If, in the installation, use or maintenance of the System VMR damages or disturbs the surface or subsurface of any public road or adjoining public property or the public improvement located thereon, therein, or thereunder, VMR shall promptly, at its own expense, and in a manner acceptable to Tempe, restore the surface or subsurface of the public road or public property, or repair or replace the public improvement thereon, therein, or thereunder, in as good a condition as before such damage or disturbance. If such restoration, repair or replacement of the surface, subsurface or any structure located thereon, therein, or thereunder is not completed within a reasonable time, or such repair or replacement does not meet Tempe's duly adopted standards, Tempe shall have the right to perform the necessary restoration, repair, or replacement, either through its own forces or through a hired contractor, and VMR shall reimburse Tempe for its expenses in so doing within thirty (30) days after receipt of City's invoice therefor.

VMR agrees to reimburse Tempe for all costs arising from the reduction in the service life of any public road, to the extent required by the pavement cut surcharge ordinance, resulting from pavement cuts of VMR. VMR shall pay such costs, within thirty (30) days from the date of invoice.

If VMR's relocation efforts so delay construction of a public project causing Tempe to be liable for delay damages, VMR shall reimburse Tempe for those damages attributable to the delay created by VMR. In the event VMR should dispute the amount

of damages attributable to it, the matter shall be resolved per Section 15, Issue Resolution..

In the event Tempe becomes aware of a potential delay involving VMR facilities, Tempe shall promptly notify VMR of this potential delay.

In no event shall Tempe be liable to or responsible for any accident or damage that may occur in the construction, operation, or maintenance by VMR of the System hereunder, and the acceptance of this authorization to use the public way shall be deemed an agreement on the part of VMR to indemnify Tempe and hold it harmless from and against any and all liability, loss, costs, legal fees, damage or any other expense that may be imposed on Tempe by reason of the acts of VMR in the construction, operation, and maintenance of its lines and appurtenances hereunder, including the maintenance of barricades and traffic control devices in construction and maintenance areas.

SECTION 6.0 OPERATIONS

Tempe agrees to allow VMR to operate the System, in accordance with the terms, conditions, and requirements of the Operations and Maintenance Agreement to be entered into by the Parties, provided traffic progression is maintained, to a reasonable level, along City streets sharing the light rail and along major cross streets where Tempe maintains traffic coordination systems. VMR and Tempe shall create a Special Event Team and cooperatively develop a special events plan. Operational disputes between VMR and Tempe shall be resolved jointly and elevated as described in Section 15. VMR shall coordinate all special events with Tempe's Traffic Operations Division of the Street Transportation Department. VMR and Tempe may agree to additional operating conditions at the completion of the Project.

SECTION 7.0 TRAFFIC REGULATIONS

System vehicles traveling on the Occupied Tempe Property shall be subject to all traffic control ordinances, statutes, and regulations, not in conflict with federal law.

SECTION 8.0 DESIGN APPROVAL

VMR agrees that Tempe shall have the right, after completion of the Project and during the term of this Agreement, to review and approve, conditionally approve, or deny all future additions, changes, and alterations to, and modifications and replacements of, any System improvements on Occupied Tempe Property that would materially change the System or alter the Plans and Specifications provided in the Design and Construction Agreement.

SECTION 9.0 TERMINATION

This Use Agreement, and any rights granted to VMR by this Agreement shall be subject to termination at the option of either VMR or Tempe by written notice delivered to the other prior to the end of the otherwise effective term hereof, upon the occurrence of any of the following events:

- (i) VMR abandons, at any time, the rights to use the Occupied Tempe Property;
- or
- (ii) VMR discontinues regular use or occupation of the Occupied Tempe Property for the provision of regular System service for twelve (12) consecutive months; or
- (iii) VMR is in default in the performance of any material covenant, term or condition contained in this Use Agreement, pursuant to the terms and time frames set forth in Section 14.0 hereof.

SECTION 10.0 AGREEMENT NON-ASSIGNABLE

VMR may not assign or otherwise transfer any of its rights or obligations hereunder to a third Party without the express prior written consent of Tempe, which

may be granted or withheld by Tempe in its sole and absolute discretion. Any assignment or transfer without such prior written consent shall be void.

SECTION 11.0 INDEMNIFICATION

Except for Claims arising solely and exclusively from the negligent or willful acts or omissions of the Indemnitee, VMR shall indemnify, defend, save and hold harmless the City of Tempe and its officers, officials, agents, and employees (hereinafter referred to as "Indemnitee") from and against any and all claims, actions, liabilities, damages, losses, expenses, and costs (including court costs, attorneys' fees, and costs of claim processing, primary loss investigation, and litigation) (hereinafter referred to as "Claims") for bodily injury or personal injury (including death), loss or damage to tangible or intangible property, and economic or financial loss of any character or any nature: (1) arising out of the work done in under the terms of this Agreement, (2) or caused, or alleged to be caused, in whole or in part, by the negligent or willful acts or omissions of VMR or any of its owners, officers, directors, agents, or employees, including "loaned" employees from the City of Tempe.

It is the specific intent of the Parties to this contract that the Indemnitee shall, in all instances except for loss or damage resulting from the sole and exclusive negligence of the Indemnitee, be indemnified against all liability, loss or damage of any nature whatever for on account of any injuries to or death of person or damages to or destruction of property belonging to any person, or economic or financial losses arising out of or in any way connected with the performance of this Agreement, regardless of whether or not the liability, loss or damage is caused by, or alleged to be caused in part by the negligence, gross negligence, or fault of the Indemnitee.

This indemnity includes, but is not limited to, any claim or amount arising out of or recovered under the Workers' Compensation Law or arising out of the failure of

VMR to conform to any federal, state, or local law, statute, ordinance, rule, regulation, or court decree.

It is agreed that VMR will be responsible for primary loss investigation, defense, and judgment costs. VMR agrees to waive all rights of subrogation against the Indemnatee.

SECTION 12.0 INSURANCE

Consistent with its By-Laws the VMR Board of Directors shall determine what insurance coverage is appropriate to protect the Corporation, the Members, and the LRT Project from risks concerning the LRT Project. The Corporation shall obtain such insurance on behalf of the Members. In deciding what insurance coverage is appropriate, the Board will receive the assistance and advice from the VMR Risk Management Committee, which is comprised of the Members' Risk Manager, or designee. The Board may elect to self-insure for all or a portion of such risks.

SECTION 13.0 DUTY TO RESTORE

Upon the expiration of this Agreement, or earlier termination or partial termination of the VMR Use Rights and/or this Agreement pursuant to Section 9 hereof, all System improvements located on Occupied Tempe Property as to which VMR Use Rights have been terminated shall, at the option of Tempe, be removed, and the Occupied Tempe Property shall be restored to a condition consistent with the then current condition of adjoining streets or other public facilities with respect to grade, appearance, quality, finish, and type of construction, at the sole cost and expense of VMR. Restoration shall be performed within ninety (90) days of such expiration or termination, or such longer period as shall be required by the nature of the work and as agreed to in writing by Tempe. If VMR fails to restore the Occupied Tempe Property as required herein, Tempe may perform such work after thirty (30) days prior written notice to VMR, and

VMR hereby agrees to pay all costs of Tempe in connection with such work, including any collection costs and attorney's fees.

SECTION 14.0 DEFAULT

Either Party shall be deemed in default under this Agreement upon the failure of such Party to observe or perform any covenant, condition, or agreement on its part to be observed or performed hereunder, and the continuance of such failure for a period of thirty (30) days after the giving of written notice by the other Party, as required herein. Such notices shall specify such failure and request that it be remedied, unless the Party giving such notice shall agree in writing to an extension of such time period prior to its expiration. However, if the failure stated in such notice cannot be corrected within the applicable period, it shall not give rise to a default hereunder if corrective action is instituted within the applicable period and diligently pursued until such failure is corrected. In the event of a default hereunder, the non-defaulting Party shall have a breach of contract claim and remedy against the other in addition to any other remedy provided or permitted by law, provided, however, that no remedy that would have the effect of amending any provisions of this Agreement shall become effective without the formal amendment of this Agreement.

SECTION 15.0 ISSUE RESOLUTION

Any dispute regarding the construction or interpretation of any provision of this Agreement, or regarding any policy matter or the determination of an issue of fact, which dispute is not resolved at staff level, shall be referred to VMR's Chief Executive Officer and a representative designated by the City Manager. If, after good faith negotiations aimed at reaching an amicable resolution, a dispute cannot be resolved, the issue shall be presented to the VMR Board for resolution. If not resolved at this level, the dispute may then be brought before a court of competent jurisdiction in Maricopa County, Arizona.

SECTION 16.0 NOT USED

SECTION 17.0 NOT USED

SECTION 18.0 NOTICE

Any notice, consent, or other communication ("NOTICE") required or permitted under this Agreement shall be in writing and either delivered in person, sent by facsimile transmission, deposited in the United States mail, postage prepaid, registered or certified mail, return receipt requested, or deposited with any commercial air courier or express service addressed as follows:

If intended for Valley Metro Rail, Inc.:

Chief Executive Officer
Valley Metro Rail, Inc.
411 N. Central Avenue, Suite 200
Phoenix, Arizona 85004
Telephone: (602) 534-1807

If intended for Tempe:

City Manager
City of Tempe
51 E. Fifth Street
Tempe, Arizona 85281
Telephone: (480) 350-8221

Notice shall be deemed received at the time it is personally served or, on the day it is sent by facsimile transmission, on the second day after its deposit with any commercial air courier or express service or, if mailed, ten (10) days after the notice is deposited in the United States mail as above provided. Any time period stated in a notice shall be computed from the time the notice is deemed received. Either party may change its mailing address, FAX number, or the person to receive notice by notifying in writing the other party as provided in this section.

Notice sent by facsimile transmission shall also be sent by regular mail to the recipient at the above address. This requirement for duplicate notice is not intended to change the effective date of the notice sent by facsimile transmission.

SECTION 19.0 AMENDMENT

This Agreement may be modified or amended only by a written instrument executed by the Parties and/or all of their successors or assigns, as applicable.

SECTION 20.0 GOVERNING LAW

This Agreement shall be construed, interpreted and applied in accordance with the laws of the State of Arizona.

SECTION 21.0 NON-WAIVER

No covenant or condition of this Agreement may be waived by any Party, unless done so in writing. Forbearance or indulgence by any Party in any regard whatsoever shall not constitute a waiver of the covenants or conditions to be performed by the other.

SECTION 22.0 SEVERABILITY

If any provision of this Agreement shall be held or deemed to be or shall, in fact, be illegal, inoperative or unenforceable, the same shall not affect any other provision or provisions herein contained or render the same invalid, inoperative or unenforceable to any extent whatever.

SECTION 23.0 BINDING AGREEMENT

This Agreement shall be binding upon all of the assigns, grantees and successors in interest to each of the Parties, and shall remain in full force and effect until amended as provided herein.

SECTION 24.0 SURVIVORSHIP

Provisions of this Agreement which by their nature are intended to continue in force beyond the Term of this Agreement and will survive any termination of this Agreement.

SECTION 25.0 FURTHER ASSURANCES

The Parties hereto shall execute such other documents and take such other actions as may be reasonably necessary or proper to achieve the intent and purposes hereof.

SECTION 26.0 INCORPORATION OF EXHIBITS

This Agreement in its entirety includes Exhibits A and B, all of which are incorporated herein and made a part hereof. The Exhibits of this Agreement are as follows:

- | | |
|-----------|------------------------------|
| Exhibit A | System Map (Contractual) |
| Exhibit B | Member Agreement (Reference) |

IN WITNESS WHEREOF, the Parties have each executed this Agreement as of
the date first set forth above.

VALLEY METRO RAIL, INC

Richard J. Simonetta, Chief Executive Officer

By: _____

APPROVED AS TO FORM

By: _____

Counsel Valley Metro Rail, Inc

CITY OF TEMPE

Neil G. Giuliano, Mayor

By: _____

APPROVED AS TO FORM

By: _____

City Attorney for the City of Tempe

ATTEST:

By: _____

City Clerk